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29157 7590 06/24/2008 BELL, BOYD & LLOYD LLP P.O. Box 1135 CHICAGO, IL 60690				
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LEVY, NEIL S				
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/070,799
Filing Date: September 16, 2002
Appellant(s): YOUNG ET AL.

ROBERT BARRETT
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 4/9/08 appealing from the Office action
mailed 8/24/07.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6156355	SHIELDS	12-2000
EP-0862863	CAVADINI	09-1998

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WO-98/56263 MARSH 12-1998

5756088 MATSUURA 5-1998

LOWE- CANINIE NUTRITION, P.280,281,285 ; 1988

LAB DIET ; 5006 CANINE DIET ; 8/14/98

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1,4,6,8,10,12,13,15-17,19-24,& 30-33 stand rejected under 35 U.S.C. 103(a) as being unpatentable over SHIELDS et al 6156355 in view of CAVADINI et al EPO862863 or MARSH et al WO98/5263.

SHIELDS provides nutritionally (Examples 1-6) complete dog feeds with inulin, a fructooligosaccharide (FOS) of chicory as prebiotic at 0.5-10% (column 6, lines 45-62; column 11, lines 33-53) and L. acidophilus as probiotic (Examples 1-6 and column 12, lines 4-7). Zinc (column 6, line 7, Examples 1-6 and column 11, line 33 column 12, line 8).. SHIELDS Claims 5 and 6 require the sources of long chain fatty acid, taught as the essential fatty acid, linolenic, as oils of salmon, canola, & evening primrose. zinc, the prebiotic inulin as chicory root extract, and the probiotic Lactobacillus acidophilus in a complete feed are also at claims 5 & 6. These are the most limiting of the instant claims, & invention. The feeds are to be fed daily, the instant methods, & so would provide the instant benefits. Methods of feeding to maintain and improve health and

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nutrition and prevent nutritional problems (column 7) inclusive of the instant healthy skin and coat function, as shown at column 10, lines 36-38, and column 15, lines 33-35 and examples 5 and 6. SHIELDS carbohydrate source is the grain, rice.

The only distinction from the instant claims is that the probiotic concentration is unspecified; however, we would find the feed formulator would know how much to provide, since SHIELDS states healthy skin & coat is obtained.

Looking for specific guidance in this regard, we find :CAVADINI shows advantageous inclusion of the instant and SHIELDS probiotic *L.acidophilus* (page 3, line 32) into cereals, inclusive of rice (page 3, line 32), the SHIELDS grain. Also present is (page 4, top) inulin of chicory at 2-10%; this is the instant prebiotic, although this term is not used. The probiotic is 10 to the 4th to 10 to the 10th cells and 0.5-20% of the total cereal (p. 5, lines 22-26). Specific reference to pet feed supplement is at page 5, lines 46-47. Both SHIELDS and CAVADINI provide pet feeds, with prebiotic and probiotic, but only CAVADINI specifies how much probiotic to add. SHIELDS provides 20-45% rice as the only cereal (column 5, lines 40-50), thus if CAVADINI suggests 0.5-20% of cereal, 20% of 50% = 10% probiotic would be feasible to include. MARSH also shows how much probiotic should be added; 1-7% to a complete feed.

It would have been obvious at the time of the instant invention for one of ordinary skill in the canine feed arts to incorporate SHIELDS prebiotic & probiotic ingredients of known

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efficacy to enhance digestion & improve health & skin & coat, with known diets, at levels, as shown by CAVADINI, &/or MARSH, chosen to optimize desired parameters of performance. Modification to include soy with probiotics as of would be an obvious means of providing commonly used fatty acid source, if allergy were not an issue. It would be within the purview of one in the pet arts to find it obvious to apply the desired amounts and proportions of nutrient and dietary aids to optimize desired effects. Further, no objective showing of non-obvious or unexpected results is shown by the applicant to distinguish over the prior art use of the particular ingredients.

Claims 1,4, 6, 8, 10, 12, 13, 15-17, 19-24, 30-33 stand rejected under 35 U.S.C. 103(a) as being unpatentable over LOWE '88 in view of Marsh-WO 98/56263 & Shields & LAB DIET '98, Matsuura et al 5756088 & Cavadini et al EP 0862863.

LOWE presents the the instant problem; proper diet is needed to avoid allergy, which

can manifest as skin and intestinal problems, with increased growth of pathogens. Adding probiotics would enhance the growth of beneficial microbes and counter pathogen effects. MARSH shows supplementation with zinc and linoleic acid sources, such as fish oil and soy oil, will enhance skin and coat condition. MARSH's complete feed includes as the instant non-specified probiotics, yeast at 1.7%. SHIELDS also address skin concerns, and provides the combination of a pre and probiotic as part of complete feeds, with 0.5-10% inulin fiber source as chicory. MATSUURA also teaches

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this amount of probiotic as a part of a prescription diet for treatment of skin problems (column 2, lines 57-63) along with linoleic acid, from fish and/or soy (column 2, lines 6, 7, 15-19). Additionally, FOS, inulin sources are added, and zinc (column 2, line 64; column 3, line 5). CAVADINI shows how much of the prebiotics (page 4, lines 1-6) as chicory, inulin, FOS—2-10%, and probiotics (page 5, lines 22-26) 0.5-20% of cereal product should be added. with 10 to the 4th to 10 to the 10th cells of the grain portion of diet.

LAB DIET is cited to show a standard complete diet .

The supplements would be obvious to add to a canine diet at the amounts shown by CAVADINI and MATSUURA, with zinc, and linoleic acid from soy meal as sources of long chain fatty acids, & yeast as the instant probiotic , with dried beet pulp as a source of inulin and/or fructooligosaccharide as the instant prebiotic. Thus, one in the canine nutritional arts, aware of the skin problems discussed by LOWE & desiring to improve the health & skin & coat condition of a dog , would have found it obvious at the time of the instant invention to utilize a supplement of the prebiotic and probiotic shown as effective by SHIELDS & CAVADINI, with a linoleic oil & zinc source, to be added to the diet, as shown by MARSH or MATSUURA to provide and maintain healthy skin and hair.

There are no unobvious or unexpected results obtained since the prior art is well aware of the use of prebiotics and probiotics, mineral, and fatty acids as supplements with plant components of inulin & FOS. The selection of each of these ingredients is a result

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effective parameter chosen to obtain desired effects. It would be obvious to vary the concentration of ingredients to optimize the effects desired-better health, hair, bone growth, performance, for example, and the use of additives functionally for which they are known to be used is not a basis for patentability. Further, no objective showing of non-obvious or unexpected results is shown by the applicant to distinguish over the prior art use of the particular ingredients.

(10) Response to Argument

The issue is appellant feeds for skin and coat improvement of pets, while the prior art feeds for health & general improvement of pets, in particular canines. Both prebiotic & probiotic ingredients are fed by MATSUURA, but MATSUURA only specified skin and coat improvements resulting from probiotic feeding.

Appellant argues Shields fails to address prebiotics @ 0.1% to 20%,; however, Shields shows effective maintenance & improvement of health of skin & coat by feeding the inulin at 0.5% to 10% (col. 6, lines 47-51).

Appellant argues Cavadini & Marsh use at best probiotics not prebiotics. MARSH is for probiotics to improve coat, but Cavadini shows both are fed, improving various aspects of general health, &, whether recognized or not by Cavadini, feeding the instant PREBIOTICS also (see page (page 4, lines 1-6) as chicory, inulin,

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FOS—2-10%.

Appellant were surprised at the effects skin & coat systems of pets fed nutritional agents, but these effects have been shown by SHIELDS & MATSUURA. Even the basis for the effects, enhanced growth of G.I. tract bifido & lactic bacteria have been alluded to in the prior art. However, regardless of the mechanism of action, the prior art shows the instant ingredients, if fed to canines, improve general health & well being, with special recognition of improvement in hair & coat condition & skin health. These ingredients include inulin & FOS, the instant prebiotics; linoleic acid & zinc, & Lactabacillus acidophilus & other probiotics, including yeast. Accordingly, the results of administering these ingredients, at the suggested amounts, are far from surprising; they are expected; only the mechanism of action may have been unknown. Recognition of the mechanism of action of the result of feeding is not seen as a basis of patentability. The basis for Appellants arguments are that the references fail to teach prebiotics & probiotics improve or enhance skin & coat condition of pets.

Examiner finds that the prior art in fact, while recognizing skin problems in pets, & addressing them with zinc & long chain fatty acids, linoleic as evident in the prior art, also does exactly what appellant claims; feeds the inulin & FOS, whether identifying them as prebiotics (Shields does) or not (Cavadini). As to the amounts fed, they are the instant amounts of prebiotics as fed by Shields, & by Cavadini, who also show the instant amounts of probiotics fed.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/NEIL LEVY/

Primary Examiner, Art Unit 1615

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